U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042.
Washington, DC 20529

U.S. Citizenship and Immigration Services

PUBLIC COPY

B5

[redacted]

FILE: LIN 04 176 52654 Office: NEBRASKA SERVICE CENTER Date: MAY 25 2006

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition and reaffirmed that decision on motion. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a civil engineering consulting firm. It seeks to employ the beneficiary permanently in the United States as a project engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. The statute requires that the petition be accompanied by certification from the Department of Labor, Form ETA-750, with two exceptions. The petitioner submitted an uncertified Form ETA-750. The director determined that the petitioner had not submitted a certified Form ETA-750 or complied with either exception. Thus, the director denied the petition accordingly.

On appeal, the petitioner reiterates its claim that the beneficiary is in a shortage occupation that does not require an individual labor certification but indicates that it is pursuing labor certification with the Department of Labor. As will be discussed in more detail below, the petitioner is attempting to utilize a pilot program that was abolished before it was ever implemented. As such, we uphold the director's ultimate conclusion that an individual labor certification was required in this matter and that the record lacks a certified Form ETA-750.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

The beneficiary holds a Ph.D. from Utah State University. The beneficiary's occupation falls within the pertinent regulatory definition of a profession. The beneficiary thus qualifies as a member of the professions holding an advanced degree. The only issue is whether a labor certification from the Department of Labor is required.

The petitioner relies on the following language on the instructions for the Form I-140 petition for the proposition that an individual labor certification is not required in this matter:

> If the alien is in a shortage occupation, or for a Schedule A/Group I or II occupation, you may file a fully completed, uncertified Form ETA-750 in duplicate with your petition for determination by INS [now CIS] that the alien belongs to the shortage occupations.

The regulation at 8 C.F.R. § 204.5(k)(4) provides, in pertinent part:

> *Labor certification or evidence that alien qualifies for labor Market Information Pilot Program* – (i) *General.* Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation (if applicable), or by documentation to establish that the alien qualifies for **one of the shortage occupations in the Department of Labor Market Information Pilot Program**. To apply for Schedule A designation or to establish that the alien's occupation is within the Labor Market Information Program, a fully executed uncertified Form ETA-750 in duplicate must accompany the petition.

(Bold emphasis added.) The petitioner has asserted that the beneficiary works in a shortage occupation and discusses its attempts to find qualified workers. Thus, it is clear that the petitioner believes the beneficiary qualifies under the Labor Market Information Pilot Program. The director, however, presumed that the petitioner was seeking to utilize Schedule A, Group II, which provides benefits for aliens of exceptional ability as defined at 20 C.F.R. § 656.22(d). The director determined the record lacked any evidence relating to Schedule A, Group II and denied the petition. In the first appeal, the petitioner noted that it was seeking to classify the beneficiary as an advanced degree professional, not an alien with exceptional ability as defined at 8 C.F.R. § 204.5(k)(3)(ii). As the first appeal was untimely, the director considered it as a motion to reconsider pursuant to 8 C.F.R. § 103.3(2)(v)(B)*(2)* and determined that the petitioner needed to obtain certification from the Department of Labor prior to filing a petition with CIS. On appeal, the petitioner continues to assert that since the beneficiary is in a "shortage occupation," certification from the Department of Labor is unnecessary. The petitioner further asserts, however, that it is pursuing such certification.

The beneficiary must be eligible as of the date of filing. *See* 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm. 1971). Thus, should the petitioner obtain a labor certification from the Department of Labor, that certification would need to support a new petition. As such, the only matter before us is whether the beneficiary qualifies for any exception to that requirement.

As discussed above, the petitioner asserts that an individual labor certification is not required because the beneficiary is within a shortage occupation designated by the Department of Labor under the Labor Market Information Pilot Program. This program was authorized in 1990 under section 122(a) of Public Law 101-649. While the Department of Labor issued *proposed* regulations to implement this program, 58 Fed. Reg. 15242-01 (March 19, 1993), those regulations were never finalized. Congress abolished the program in 1994 before it had even been implemented. P.L. 102-416 § 219(ff) (1994). Thus, while the instructions for the Form I-140 and the regulation at 8 C.F.R. § 204.5(k)(4) were written in the expectation that the program would be implemented and were never amended to reflect the

abolition of this program, the program was abolished before ever being implemented. Thus, the petitioner cannot seek benefits for the beneficiary under this program as it never existed as a viable program. We will, however, consider the two exceptions to individual labor certification that are viable for eligible aliens.

First, section 203(b)(2)(B) provides that Citizenship and Immigration Services (CIS) may, when deemed in the national interest, waive the labor certification requirement. The precedent decision addressing national interest waivers of is *Matter of New York State Dep't. of Transp.*, 22 I&N Dec. 215 (Comm. 1998), which sets forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. The petitioner has never asserted that it is seeking a national interest waiver of the job offer (labor certification) requirement and has never addressed these factors. Thus, the petitioner has not established that a national interest waiver is warranted in this matter.

Second, as quoted above, the regulation at 8 C.F.R. § 204.5(k)(4)(i) provides that evidence of eligibility for Schedule A is acceptable as an alternative to an individual labor certification.

While the petitioner seeks to classify the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Act, in order to establish eligibility for Schedule A, Group II designation, the petitioner must establish that the beneficiary qualifies as an alien with exceptional ability *as defined by the Department of Labor* at 20 C.F.R. § 656.22(d). While it is admittedly confusing that section 203(b)(2) of the Act and the regulations pertaining to Schedule A, Group II both use the phrase "exceptional ability" with significantly different criteria, that language is binding on us. The regulation at 20 C.F.R. § 656.22(d) provides:

> An employer seeking labor certification on behalf of an alien under Group II of Schedule A shall file, as part of its labor certification application, documentary evidence testifying to the *widespread acclaim and international recognition* accorded the alien by recognized experts in their field; and documentation showing that the alien's work in that field during the past year did, and the alien's intended work in the United States will, require exceptional ability.

(Emphasis added.) In addition, the same provision outlines seven criteria, at least two of which must be satisfied for an alien to establish the widespread acclaim and international recognition necessary to qualify as an alien of exceptional ability. Given the introductory language to the criteria emphasized above in 20 C.F.R. § 656.22(d), the evidence submitted to meet these criteria should reflect "widespread acclaim and international recognition."

The petitioner does not challenge the director's determination that no evidence was submitted relating to Schedule A, Group II. Thus, the beneficiary does not qualify for Schedule A, Group II, the second exception to the labor certification process.

The petitioner submitted only an uncertified Form ETA-750. For the reasons discussed above, the petitioner has not established that an individual labor certification from the Department of Labor is not required in this matter. Specifically, the Labor Market Information Pilot Program on which the petitioner relies was never implemented and the petitioner has not presented evidence relating to a national interest waiver or Schedule A, Group II. Thus, the petitioner has not complied with 8 C.F.R. § 204.5(k)(4)(i) or (ii).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.